88-1910

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GERALDINE TEMPLIN, *Petitioner*
v.
LYNNETTE R. WEISGRAM, *Substitute Trustee*
and
FEDERAL DEPOSIT INSURANCE CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Geraldine Templin, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case on March 8, 1989.

QUESTION PRESENTED FOR REVIEW

WHETHER A DEED OF TRUST THAT IS VOID AS A MATTER OF LAW PURSUANT TO THE TEXAS CONSTITUTIONAL PROTECTION OF THE HOMESTEAD CONTAINED IN ART. XVI, § 50, CONFERS ANY "RIGHT, TITLE OR INTEREST" ON THE FDIC WITHIN THE MEANING OF 12 U.S.C. § 1823(E)?

LIST OF PARTIES

GERALDINE TEMPLIN, Petitioner

LYNNETTE R. WEISGRAM, Substitute Trustee, Respondent

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent

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JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *Templin v. Weisgram*, No. 88-1801, is dated March 8, 1989. The judgment was also entered March 8, 1989. No petition for rehearing was filed. The jurisdiction of the Supreme Court is invoked under 28 U.S.C § 1254.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are two constitutional and statutory provisions involved in this case:

I. Texas Constitution, Article XVI, § 50:

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.

II. 12 U.S.C § 1823 (e):

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

STATEMENT OF THE CASE

I. Procedural background

This case involves an attempt by the Federal Deposit Insurance Corp. (FDIC), as receiver for a failed bank, to foreclose a mortgage on the homestead of Geraldine Templin, Petitioner. She instituted this action in state district court to enjoin FDIC from the foreclosure. The state district court granted a temporary restraining order and FDIC removed this action to the U.S. District Court for the Northern District of Texas. The United States District court acquired jurisdiction pursuant to 12 U.S.C § 1819. FDIC filed a motion for summary judgment which was granted by the trial court.

II. Factual background

The opinion of the United States Court of Appeals gives a succinct and clear statement of the facts.

The facts are as follows:

1. On September 7, 1978, Petitioner, Geraldine Templin, was married to Bill Biggs and was known as Geraldine Biggs, or Jeri Biggs. On such date the Biggs purchased the property at 1509 S. Irving Heights, in Irving, Dallas County, Texas, the property which is the subject of this suit.

2. From September 7, 1978, to present Petitioner has maintained this residence as her domicile and homestead.

3. On February 22, 1985, Petitioner and her husband executed a warranty deed conveying the property in question to Robert M. Nelson. Nelson executed a deed of trust to the First National Bank of Irving, Texas to secure a note to First National Bank of Irving in the amount of $104,000.00.

4. The transaction between the Biggs and Nelson was a simulated and pretended sale, arranged by the bank for the purpose of permitting Mr. Biggs to borrow $104,000.00 from the bank. Nelson was a straw man whose cooperation was obtained by a representative of the bank.

5. The property was never abandoned by Petitioner as her homestead although she later divorced Mr. Biggs.

6. It was the intention of the Biggs and the bank that Nelson have no interest in the property and all parties agreed that Mr. Biggs would repay the $104,000.00 loan, of

which $42,120.00 was retained by the bank to cover a debt then owing by Biggs.

7. Nelson received no consideration of any kind for his involvement. On January 15, 1986, Nelson executed and filed of record his warranty deed reconveying the property to Mr. Biggs and Petitioner. The deed was filed of record in Vol. 86027, p. 2663, of the Deed Records of Dallas County, Texas on February 10, 1986.

8. On April 24, 1986, the First National Bank of Irving was declared insolvent and the FDIC was appointed receiver. The FDIC as receiver sold to FDIC-Corporate all assets of First National Bank of Irving, including the bank's interest in the $104,000 note and deed of trust.

9. The $104,000 note was in default and the FDIC, through Respondent Lynnette R. Weisgram, Substitute Trustee, initiated foreclosure proceedings on April 11, 1988.

10. The books and records of the First National Bank of Irving contain no reference to the agreement by the Bank, Nelson and the Biggs that the transaction was a pretended sale and that the Biggs retained the property as their homestead.

III. The rulings below

The FDIC filed a motion for summary judgment in the United States District Court alleging that Petitioner's suit was barred under federal common law and 12 U.S.C. § 1823(e).

The District Court, Sidney A. Fitzwater, Judge, granted the FDIC's motion for summary judgment on the ground that evidence of the agreement between the Biggs and Nelson could not be considered against the FDIC.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. The Court of Appeals held that 12 U.S.C. § 1823(e) precluded Petitioner from offering her defense that the property in question was her homestead and the pretended sale to Nelson was void by operation of Texas Constitution Art. XVI, § 50. The Court of Appeals held that the agreement between Petitioner and Nelson did not meet the terms of § 1823(e) (i.e., that the agreement between these parties was not recorded in the records of the bank) and thus could not be proved because it could not be admitted into evidence.

The Court of Appeals stated that Petitioner's defense that the deed of trust in question was void and thus conveyed no "right, title or interest" to FDIC was not tenable for two reasons. First, the appeals court dismissed the language of this court in *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86 (1987), which distinguished between voidable titles (which did convey some "right, title or interest" within the meaning of 12 U.S.C. § 1823(e)) and void titles (which did not) was merely dictum. Second, it held that it is the manner in which an instrument is proven to be void, not the conclusion that the instrument is void, that determines whether it is within the aegis of § 1823(e). In this case the appeals court stated that since the void nature of the transaction was not apparent on its face, its voidness could not be proven by extrinsic evidence.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WITH THIS COURT'S DECISION IN *LANGLEY.*

This court made a clear distinction between voidable and void titles in *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86 (1987) [hereinafter cited as *Langley*] (and further set out at 108 S. Ct. 396, 402) and their relationship to 12 U.S.C. § 1823(e). Since *Langley* involved a voidable title, this court correctly held that a voidable title did convey some "right, title, or interest" that § 1823(e) protected. However, this court noted that a void instrument "would take the instrument out of § 1823(e), because it would render the instrument entirely void ... thus leaving no 'right, title, or interest' that could be 'diminish(ed) or defeat(ed).'" [Citations omitted]. 108 S.Ct. at 402.

Even though this court's statement in *Langley* may have been dictum for the purposes of the decision in *Langley*, such statement by the Supreme Court sets forth a clear legal principle. The failure of the Court of Appeals to apply the principle set forth in *Langley* that a void instrument is taken completely out of the scope of § 1823(e), on the grounds that such statement was dictum, plainly conflicts with the opinion of this court.

In addition, the statement by the Court of Appeals in its opinion that it is the manner in which an instrument is proven to be void, not the conclusion that the instrument is void, that determines whether it is within the scope of § 1823(e), is also inconsistent with the statement set forth in the Supreme Court's opinion in *Langley*. There is nothing in the opinion in *Langley* which suggests that the manner in which an instrument is proven to be void determines whether or not it is within § 1823(e). The Supreme Court's opinion in *Langley* succinctly states that a void instrument has no right, title or interest which can be diminished or defeated. The language of the Supreme Court does not indicate that some void instruments are within § 1823(e) and some are not.

If an instrument is void it should not matter what type of evidence is necessary to prove its status. The specific hypothetical considered by this court in *Langley* was fraud in procuring a person's signature when he has no knowledge of

the true nature of its contents. 108 S.Ct. at 402. This type of fraud is not apparent on its face and would require the introduction of extrinsic evidence, including, in all likelihood, parol evidence.

Article XVI, § 50 of the Texas Constitution declares that pretended or simulated sales of the homestead are void. It is undisputed that the transaction between Petitioner and Nelson is void under Texas constitutional law. Article XVI, § 50 does not distinguish between participants in a pretended sale of the homestead who are more or less culpable. It simply declares all such transactions void. Indeed, it is well settled in Texas law that the homestead provision protects the homestead at all costs, even from the folly of the owners.

The decision of the Court of Appeals, as well as the District Court, that evidence of the transaction between Petitioner and Nelson cannot be admitted because such evidence is precluded by § 1823(e) is erroneous for the reason that it is only evidence of voidable transactions that is precluded by § 1823(e). If void transactions are not taken out of this statute, and not specifically precluded by the statute, then evidence of a void transaction would be entitled to be admitted. This the district court and the court of appeals refused to do.

This court should grant certiorari to instruct the courts of appeals on the issue of void instruments and their relationship to § 1823(e), first discussed by this court in *Langley*. In view of the emerging crisis in the banking industry, the application of § 1823(e) has immediate interest and impact on the majority of the national business community.

II. CERTIORARI SHOULD BE GRANTED TO RESTORE THE PROTECTION OF THE TEXAS CONSTITUTION'S HOMESTEAD EXEMPTION.

The Fifth Circuit itself has declared that Texas' constitutional and statutory protection of the homestead is absolute, is a fundamental policy of Texas law, and is accorded great importance. *Matter of Moody*, 862 F.2d 1194 (5th Cir. 1989), *In Re Niland*, 809 F.2d 272 (5th Cir. 1987).

28 U.S.C. § 1652 provides that the laws of the states, except where the constitution or treaties of the United States or Acts of Congress otherwise provide, shall be regarded as rules of decision in civil actions in United States courts.

The decision of the Court of Appeals, as well as of the District Court, that evidence of the effect of Art. XVI, § 50 of the Texas Constitution on a Texas transaction clearly within its provisions cannot be proven by evidence otherwise admissible is a fundamental failure to accord Petitioner the absolute protection given her by the Texas Constitution.

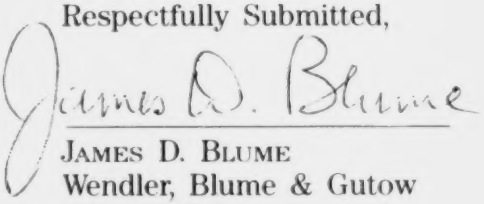
This opinion by the Court of Appeals is contrary to its rules of decision and its own precedents. The great importance of the homestead provision to Texas law and public policy, as well as the implications of such a disregard of the law of the forum for other circuits, is a compelling reason in its own right for this court to grant certiorari.

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PRAYER FOR RELIEF

Wherefore, for the reasons set out herein, Petitioner, Geraldine Templin, respectfully prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, James D. Blume, a member of the Bar of the Supreme Court of the United States and counsel of record for Geraldine Templin, Petitioner herein, hereby certify that on June 2, 1989, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the above and foregoing petition for writ of certiorari on each of the parties herein by depositing such copies in the United States Post Office, Dallas, Texas, with first class postage prepaid, properly addressed, to the post office address of each counsel of record as well as the Solicitor General of the United States.

All parties required to be served have been served.

The parties so served are as follows:
Federal Deposit Insurance Corporation and
Lynnette R. Weisgram by delivery to:
Ann S. DuRoss, Assistant General Counsel
Gregory E. Gore, Senior Attorney
550 17th Street, N.W.
Washington, D.C. 20429

Robert J. Clary, Attorney at Law
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Dallas, TX 75201-3398

Solicitor General
Department of Justice
Washington, D.C. 20530

SIGNED this 2nd day of June, 1989.

James D Blume

JAMES D. BLUME

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APPENDIX

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Geraldine TEMPLIN, f/k/a Geraldine Biggs, a/k/a Jeri Biggs, Plaintiff-Appellant,

v.

Lynette R. WEISGRAM, Substitute Trustee, and Federal Deposit Insurance Corporation, Defendants-Appellees.

No. 88-1801
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 8, 1989.

FDIC, as receiver of insolvent bank, brought action to foreclose mortgage. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, J., granted summary judgment for FDIC, and appeal was taken. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that owner of mortgaged residence was precluded from asserting invalidity of transaction under state law as defense to foreclosure action by FDIC, as purchaser of insolvent mortgagee's assets, where instruments' invalidity could be established only by reference to side agreement in which all parties to original agreement voluntarily participated.

Affirmed.

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Owner of mortgaged residence was precluded from asserting invalidity of transaction under state law as defense to foreclosure action by FDIC, as purchaser of insolvent mortgagee's assets, where instrument's invalidity could be established only by reference to side agreement in which all parties to original agreement voluntarily participated. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, KING and SMITH, Circuit Judges.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

JERRY E. SMITH, Circuit Judge:

Plaintiff Geraldine Templin filed suit in state court, seeking a temporary restraining order (TRO) and an injunction preventing the trustee of a failed bank and the FDIC in its corporate capacity (collectively, the FDIC) from conducting a foreclosure sale of Templin's alleged homestead. After the state court granted the TRO, the FDIC removed to federal court and filed a motion for summary judgment, which the district court granted. We affirm.

I.

The relevant facts are not in dispute. In 1985, Templin's then-husband, Billy Bob Biggs, was encountering certain financial difficulties in connection with a loan made to him by the First National Bank of Irving, Texas (the "bank"). Under an oral agreement between Biggs, the bank, and a Robert M. Nelson, the bank agreed to make a loan, secured by Biggs and Templin's home in Irving, to Biggs through a simulated sale of the couple's home to Nelson.

This was accomplished by having the couple execute a warranty deed to Nelson, who in turn executed (1) a promissory note in the amount of $104,000 and (2) a deed of trust to a trustee with the bank as beneficiary. In exchange, the bank forwarded to Biggs, through Nelson, $104,000, of which $42,120 was retained by the bank to cover a debt then owed by Biggs. Finally, Nelson reconveyed the property, subject to the deed of trust held by the bank, back to Biggs and Templin. All parties agreed that Biggs would pay off the promissory note executed by Nelson in favor of the bank.

As has happened all too often recently, the bank was declared insolvent, FDIC stepping in as receiver. After selling certain of the bank's assets to another bank, FDIC in its capacity as receiver sold the remaining assets, including the Nelson promissory note and deed of trust, to FDIC acting in its corporate capacity. Neither the note, the warranty deed, nor any of the bank's files and records contained any reference to the oral agreement between Biggs, Nelson, and the bank regarding the simulated sale.

When the Nelson note became delinquent, FDIC posted the property for foreclosure sale pursuant to the terms of the deed of trust executed by Nelson. Templin, who has maintained the property as her residence since 1978, filed suit in a Texas state court to restrain the FDIC from proceeding with the foreclosure sale, arguing that the deed of

trust held by the FDIC was void under the Tex. Const. art. 16 § 50.[1] After removal, the district court granted summary judgment for the FDIC, holding that Templin was barred by 12 U.S.C. § 1823(e) and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), from contesting the validity of the facially-valid deed of trust.

II.

Section 1823(e) provides that "[n]o agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC]" unless it meets four specific requirements. As the Supreme Court noted in *Langley v. FDIC*, — U.S. —, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987), one of the central goals of the statute is to protect the FDIC from undisclosed "secret" agreements that undermine the value of a bank's assets:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness[,] ... when the FDIC is deciding whether to liquidate a failed bank, ... or to provide for purchase of its assets (and assumption of its liabilities) by another bank ... Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified [instruments] that are in fact subject to undisclosed conditions.

See also FDIC v. McClanahan, 795 F.2d 512, 515 (5th Cir.1986).

1. Section 50 provides in pertinent part:
   No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

At first glance, the facts as affirmatively pleaded by Templin veritably cry out for the application of section 1823(e).[2] Templin does not contend, nor could she, that the oral agreement between the couple, Nelson, and the bank satisfies the requirements of section 1823(e). She does, however, make the rather innovative argument that since a simulated sale of a homestead such as that engaged in here is void under Texas law, no "right, title, or interest" in her homestead ever vested in the FDIC such that section 1823(e) would even apply.

For support, she looks to a brief passage in *Langley* in which the Court held that section 1823(e) barred the maker of a note from asserting against the FDIC a defense based upon the failed bank's alleged misrepresentation of existing facts. *See* 108 S.Ct. at 402. In passing, the Court noted that the respondents in the case conceded that

> the real defense of fraud in the factum — that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents ... — would take the instrument out of § 1823(e), because it would render the instrument entirely void ... thus leaving no 'right, title or interest' that could be 'diminish[ed] or defeat[ed].'

Id. (citations omitted). Arguing by analogy, Templin contends that, under Texas law, all of the instruments involved in the simulated sale of her alleged homestead, including the deed of trust held by the FDIC, are void, thus leaving the FDIC with no "right, title or interest" in the property.

We conclude that *Langley* cannot be so read. First, we are reluctant to create, on the basis of *dictum*, an exception to section 1823(e) for conduct that is without doubt precisely the type of conduct to which the section was meant to apply. The focus of the Court's discussion was whether a defense of fruad in the inducement — not fraud in the factum — was covered by section 1823(e). Thus, an acknowl-

2. On the facts as alleged, one cannot help but reach the conclusion that the loan was made through a simulated sale solely to deceive federal and state bank regulators. All parties knew that the transaction was invalid under the Texas Constitution and therefore would be unenforceable; on the bank's records, however, the note and deed of trust executed by Nelson would likely lead bank examiners to believe that the instruments did not run afoul of state law and were therefore valid assets. We cannot ignore the fact that this conduct is quintessentially the type of conduct against which § 1823(e) was designed to protect the FDIC.

edgement of what one party in the case conceded as to the defense of fraud in the factum certainly does not rise to the level of a dispositive holding, and arguably does not even rise to the level of indicating, however tentatively, the Court's views on the issue.

Second, even if we accept the passage as having some force, it should not be read as Templin suggests. Given the focus of section 1823(e), it is the manner in which an instrument is proven to be void, not the conclusion that the instrument is void, that determines whether it is within the statute. The defense of fraud in the factum does not involve proof of any side agreements; rather, a party must show that, solely as a result of another party's actions, he signed a document without full knowledge of the "character or essential terms" of the instrument. Restatement (Second) of Contracts § 163 (1981). Where, as here, however, an instrument's invalidity can be established only by reference to a side agreement in which all parties voluntarily participated, the reasoning and legislative intent underlying section 1823(e) apply with full force.[3]

III.

We thus hold that, because Templin's defense based upon Texas law could be established only by proving the existence of an agreement that does not meet the terms of section 1823(e), that section applies and operates to preclude her from asserting the defense. The district court's grant of summary judgment in favor of the FDIC is AFFIRMED.

3. *See FDIC v. Hatmaker*, 756 F.2d 34, 37 (6th Cir.1985) (concluding that § 1823(e) applies to fraud defenses in which a party must show a side agreement, but not to cases in which no side agreement need be proven); *Gunter v. Hutcheson*, 674 F.2d 862, 867 (11th Cir.) (applying § 1823(e) only to those cases in which the party must prove side agreements), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982).

In *In re Howard*, 65 B.R. 498 (Bankr.W.D. Tex.1986), the court held that the debtor's assertion that Tex. Const. art. 16 § 50 invalidated the FDIC's lien on his homestead was not bared by § 1823(e). Without expressing approval of the result reached or the reasoning used by that court, we note that *Howard* is distinguishable for the simple reason that, in that case, "no agreement [was] sought to be enforced by the Howards against the FDIC." *Id.* at 503. In *Howard*, no simulated sale took place; the debtor simply asserted that the deeds of trust which he personally executed and the bank accepted were invalid on their face. Unlike this case, therefore, neither party in *Howard* sought to enforce or introduce evidence relating to an undisclosed side agreement in contravention of § 1823(e).

IN THE

United States District Court for the Northern District of Texas

DALLAS DIVISION

GERALDINE TEMPLIN f/k/a GERALDINE BIGGS a/k/a JERI BIGGS,

Plaintiff,

vs.

LYNNETTE R. WEISGRAM, SUBSTITUTE TRUSTEE and FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants.

Civil Action No. CA3-88-0977-D

JUDGMENT

For the reasons set forth in the court's memorandum opinion and order filed today, it is ORDERED and ADJUDGED that plaintiff take nothing and that her action be dismissed with prejudice. Costs of court as calculated by the clerk are taxed against plaintiff.

Done at Dallas, Texas this 9th day of September, 1988.

/s/ SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

IN THE

United States District Court for the Northern District of Texas

DALLAS DIVISION

GERALDINE TEMPLIN f/k/a GERALDINE BIGGS a/k/a JERI BIGGS,

Plaintiff,

vs.

LYNNETTE R. WEISGRAM, SUBSTITUTE TRUSTEE and FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants.

Civil Action No. CA3-88-0977-D

MEMORANDUM OPINION AND ORDER

I.

The Federal Deposit Insurance Corporation ("FDIC"), as Receiver for First National Bank of Irving ("FNB Irving"), seeks to foreclose on certain real property located in Irving, Texas. The plaintiff, Geraldine Templin ("Templin"), contends the FDIC cannot foreclose on the property. She asserts that the lien right on which the FDIC relies is void under the Texas Constitution because it constitutes a lien against her homestead.

The FDIC concedes for summary judgment purposes certain of plaintiff's allegations. According to Templin, she and her former husband, Billy Bob Biggs ("Biggs"), the 1985

conveyed the property in question by means of a warranty deed to Robert M. Nelson ("Nelson"). Templin contends the sale is ineffective because it was pretended and simulated in order to create a lien on a homestead in violation of TEX. CONST. art. XVI, § 50. Nelson then executed a deed of trust for the benefit of FNB Irving, pledging the property as collateral for a $104,000 loan made by the bank to Nelson. Nelson also executed a note in favor of FNB Irving. The FDIC[1] is now the holder of the note and beneficiary of the deed of trust. Nelson defaulted on the note and the FDIC seeks to foreclose.

Templin alleges that she and her husband had an oral side agreement with Nelson (to which FNB Irving was a party) giving Templin and Biggs equitable title to the property and the absolute right to repurchase the property within a specified period. She concedes that they entered the transaction intentionally to circumvent the Texas Constitution's ban on using homestead property as collateral; she argues, however, that pretended homestead sales are void and that no lien validly attaches to the property. She also alleges that the illegal transaction was initiated by FNB Irving and solicited by a bank director.

II.

The FDIC moves for summary judgment, contending plaintiff is barred by 12 U.S.C. § 1823(e) and the *D'Oench, Duhme*[2] doctrine from asserting the oral side agreement to defeat the FDIC's right to the property. The FDIC asserts that its federal statutory and common law rights do not collide with the Texas homestead law because the rights simply preclude the admission of necessary predicate evidence rather than vitiate the homestead right. Templin contends her homestead claim is not barred because one can raise the contention that an instrument is void. She thus attempts to distinguish between the FDIC's rights vis-a-vis void and voidable titles.[3]

1 FDIC — Corporate.

2. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

3. She also asserts that her claim is not based upon a side agreement but upon the Texas constitution's prohibition of the transaction. The Texas constitution is not, however, self-executing. Templin must prove that the deed, which is regular on its face, is in fact a proscribed transaction. *See Ellison v. Ellison*, 630 S.W.2d 746, 747 (Tex. App. 1982, writ ref'd n.r.e.). This claim requires proof of the type that § 1823(e) and *D'Oench, Duhme* foreclose.

The court finds no support for Templin's position in the statute or case law. Last Term the Supreme Court, in *Langley vs. FDIC*, ____ U.S. ____, 108 S.Ct. 396 (1987), reaffirmed the underlying purposes for affording the FDIC protection against side agreements. The Court noted that § 1823(e) allows "federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." *Id.* at 401. Such evaluations are necessary in order for the FDIC to decide whether to liquidate a failed bank or to provide financing for purchase of its assets. *Id.* This evaluation must often be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Id.* (quoting *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982)). The Court also observed that § 1823(e) requires mature consideration of agreements by senior bank officials and prevents fradulent insertion of new terms and collusion with bank employees when a bank appears headed for failure. *Id.*

This court sees no material difference between side agreements of the kind rejected by other courts, including the Supreme Court, and the Texas homestead argument that plaintiff advances. Plaintiff does not rely on a facially invalid transaction; she grounds her argument on a document regular on its face. Plaintiff seeks to attack the validity of the transaction by means of evidence that cannot be considered against the FDIC. Because she cannot do this under settled federal law, the FDIC is entitled to summary judgment, which the court has entered today.

SO ORDERED.

September 9, 1988.

/s/ SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

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Supreme Court, U.S.
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No. 88-1946

In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALDINE TEMPLIN, PETITIONER

v.

LYNNETTE R. WEISGRAM, SUBSTITUTE TRUSTEE, AND FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that, where the Federal Deposit Insurance Corporation (FDIC) purchased from a failed bank a deed of trust that was valid on its face, 12 U.S.C. 1823(e) precluded petitioner from defeating the FDIC's enforcement of the deed of trust on the basis of a secret oral agreement that purported to alter the deed of trust.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-19) is reported at 867 F.2d 240. The opinion of the district court (Pet. App. 21-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1989. The petition for a writ of certiorari was filed on June 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner and her then-husband, Billy Bob Biggs, executed a warranty deed conveying their home to Robert M. Nelson for $104,000. Nelson took out a loan in

the amount of the purchase price from the now-insolvent First National Bank of Irving, Texas (Bank); he made out a note to the Bank in that amount and, to secure the note, also executed a deed of trust that pledged the property as collateral. The warranty deed was recorded in the Deed Records of Dallas County.

Despite appearances, this transaction was actually a sham designed not to transfer the property but, instead, merely to enable petitioner and Biggs to borrow money against their home. The "simulated" sale was a means of circumventing Article 16, § 50, of the Texas Constitution, which prohibits the use of homestead property as security for all but certain specified types of loans, including purchase money mortgages. Pursuant to an oral agreement between the Bank, Nelson, and petitioner and Biggs, the Bank paid the $104,000 directly to Biggs and petitioner (minus the amount of a debt Biggs owed to the Bank), Nelson reconveyed the property back to petitioner and Biggs, who continued to live in the house, and Biggs agreed to pay off the note. This oral agreement was nowhere reflected in Nelson's note, in the deed of trust, or in any other records of the Bank.

When the Bank failed in April 1986, the Nelson note was in default. As part of a purchase and assumption transaction undertaken when the Bank was declared insolvent, the FDIC, in its corporate capacity, acquired the note and the deed of trust.[1] The FDIC then initiated

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[1] On April 24, 1986, the Comptroller of the Currency declared the bank insolvent and appointed the FDIC as receiver. As such the FDIC entered into a purchase and assumption transaction with another solvent bank, selling certain assets and liabilities to that institution. The receiver sold the remaining assets, including the Nelson note and the deed of trust, to the FDIC in its corporate capacity. See 12 U.S.C. 1823(e); *Langley* v. *FDIC*, 108 S. Ct. 396, 400 (1987); *Gunter* v.

foreclosure proceedings according to the terms of the deed of trust executed by Nelson.

Petitioner filed suit in state court to restrain the foreclosure, arguing that, under the homestead provision of the Texas Constitution, the pretended sale of her home was void and that the recorded deed of trust was therefore invalid. The FDIC removed the case to federal district court, which granted summary judgment in favor of the FDIC. The court held that 12 U.S.C. 1823(e) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), precluded petitioner from relying on evidence of her oral side agreement to defeat the FDIC's interest in the deed of trust, which was regular and valid on its face. Relying on this Court's decision in *Langley* v. *FDIC*, 108 S. Ct. 396 (1987), the court explained that allowing petitioner to rely on her agreement, which was nowhere in evidence in the Bank's records, would defeat Section 1823(e)'s purposes of ensuring that bank examiners are able to rely on a bank's records to determine its worth and that senior bank officials can give mature consideration to bank agreements. Pet. App. 21-23.

The court of appeals affirmed. Pet. App. 15-19. Relying on *Langley*, the court pointed out that one of Section 1823(e)'s central goals was to "protect the FDIC from undisclosed 'secret' agreements that undermine the value of a bank's assets" (Pet. App. 17) and that petitioner's secret agreement was "quintessentially the type of conduct against which § 1823(e) was designed to protect the FDIC" (*id.* at 18 n.2).[2] The court explained (*id.* at 18) that peti-

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Hutcheson, 674 F.2d 862, 865-866 (11th Cir.), cert. denied, 459 U.S. 826 (1982).

[2] The court added: "On the facts as alleged, one cannot help but reach the conclusion that the loan was made through a simulated sale solely to deceive federal and state bank regulators. All parties knew

tioner was seeking to defeat the FDIC's rights under the deed of trust based on her secret agreement, in contravention of the express language of Section 1823(e), which declares that "[n]o agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in [an] asset acquired by it * * * shall be valid against the [FDIC]" unless, among other things, the agreement is "in writing."

The court rejected petitioner's claim that the deed of trust was not an asset in which the FDIC had any interest because it was void under the Texas Constitution's homestead provision. Petitioner relied on this Court's statement in *Langley* (108 S. Ct. at 402) that "the real defense of fraud in the factum * * * would take the instrument out of § 1823(e), because it would render the instrument entirely void." The court pointed out that the statement was dictum, as *Langley* involved a claim of fraud in the inducement. In any event, the court explained, the quoted statement did not deal with, and Section 1823(e) clearly covered, situations in which a party seeks to defeat the FDIC's interest in an asset by relying on a wholly voluntary side agreement that, if undisclosed, leaves the Bank's records misleading to bank regulators. The court concluded that entering into such an agreement, as petitioner did, "is without doubt precisely the type of conduct to which the section was meant to apply." Pet. App. 18. See *id.* at 18-19.

ARGUMENT

Petitioner challenges the court of appeals' ruling that, under 12 U.S.C. 1823(e), she was not entitled to defeat en-

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that the transaction was invalid under the Texas Constitution and therefore would be unenforceable; on the bank's records, however, the note and deed of trust executed by Nelson would likely lead bank examiners to believe that the instruments did not run afoul of state law and were therefore valid assets." Pet. App. 18 n.2.

forcement of the facially valid deed of trust based on the secret, oral agreement she voluntarily entered into to mask the true character of the transaction. Petitioner does not contend that the court's decision is inconsistent with any decision of any other court of appeals; nor does she contend that the decision presents an issue of general importance.[3] She contends simply that the decision applies Section 1823(e) incorrectly and in a manner that is inconsistent with this Court's decision in *Langley*. That contention is meritless.

As the court of appeals held, petitioner seeks to do precisely what Section 1823(e), in its language and purpose, forbids—to defeat the FDIC's ability to enforce a facially valid asset on the basis of a secret, voluntary, oral agreement. Thus, petitioner asserts as "valid against the [FDIC]" an agreement that does not meet Section 1823(e)'s requirements (it is not in writing and is not an official record of the Bank) but that, if valid against the FDIC, would "diminish or defeat the right, title or interest of the [FDIC] in [an] asset acquired by [the FDIC]" (namely, the deed of trust). Petitioner's claim directly conflicts with a central purpose of Section 1823(e)—to enable the FDIC "to rely on a bank's records in evaluating the worth of the bank's assets," a process that, during purchase and assumption transactions such as occurred in this case, must be carried out with great speed. *Langley*, 108 S. Ct. at 401. "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Ibid.* Allowing petitioner's secret agreement to defeat enforcement of the facially valid deed of trust in the Bank's records would produce precisely that result.

[3] Indeed, petitioner does not identify any other state whose law contains a homestead provision like that of Texas.

Petitioner nevertheless contends that the Bank did not acquire any "right, title or interest" in the deed of trust because, under the homestead provision of the Texas Constitution, the deed of trust was void. In this Court, as in the court of appeals, petitioner relies solely on a statement from the *Langley* decision to the effect that the defense of fraud in the factum "would take the instrument out of § 1823(e)" (108 S. Ct. at 402). That statement, however, does not require recognition of petitioner's defense.

First, the *Langley* statement concerns only the defense of fraud in the factum, which was not at issue in that case and has never been claimed by petitioner. Accordingly, the court of appeals' ruling is not inconsistent with a holding of the Court in *Langley* or even with dictum addressed to the particular defense asserted by petitioner. Moreover, understood in context, the statement does not establish the general proposition that petitioner suggests—namely, that any defense that would render an instrument void under state law takes the instrument outside Section 1823(e). Instead, the statement says only that the defense of fraud in the factum would render the instrument void in a way that would leave the FDIC with no "right, title or interest" within the meaning of Section 1823(e).[4]

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[4] The "right, title or interest" language of Section 1823(e) may not be the most obvious source for permitting a defense of fraud in the factum. A more natural reason why that defense is outside the reach of Section 1823(e)'s language may simply be that the signatory is not asserting a valid side "agreement"—a separate understanding or representation—as the ground for defeating the FDIC's interest in the instrument. He is asserting merely that he never knowingly and with understanding gave his assent to the terms of the document on which his signature appears. Accordingly, a recognition that the defense of fraud in the factum is not barred by Section 1823(e) does not depend on *Langley*'s reliance on the "right, title or interest" language. As explained in text, however, even if it does, the present case is different.

Furthermore, consideration of the clear purposes of Section 1823(e) suggests that fraud in the factum should produce a quite different result under that provision from that produced by petitioner's defense (even if petitioner's defense would render Nelson's deed of trust void under state law). The defense of fraud in the factum requires that the signatory to the instrument have no reasonable opportunity to know of the true character or essential terms of the instrument before signing it—and hence no reasonable opportunity to avoid being bound.[5] When the effect of enforcing a written instrument would be to bind an innocent victim of that kind of fraud, it is reasonable to construe Section 1823(e) to preclude the FDIC from acquiring any "right, title or interest."[6] In contrast, petitioner's defense, far from involving any lack of opportunity to protect herself, is based on a wholly voluntary side agreement made for the purpose of rendering misleading to third parties a written instrument that was fully known and understood by petitioner. In those circumstances, there is no reason to limit the natural meaning of Section 1823(e), under which the FDIC acquired a "right, title or interest" in the deed of trust when it purchased it from the failed Bank. Indeed, as

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[5] See U.C.C. § 3-305(2)(c) (1977); Restatement (Second) of Contracts § 163 (1981); 1 J. White & R. Summers, *Uniform Commercial Code* § 14-9, at 731-732 (3d ed. 1988). The sentence from *Langley* that petitioner relies on (108 S. Ct. at 402) cites the U.C.C. provision in referring to the defense of fraud in the factum.

[6] That *Langley*'s discussion of an exception for fraud in the factum was based on the lack of opportunity for self-protection may also be indicated by its citation of a portion of the FDIC's oral argument in that case (Tr. 24-25, 27-30) in support of permitting the fraud in the factum defense under Section 1823(e). In the cited passages, the FDIC did not argue that the test was whether the instrument was void under state law, but, rather, advanced the self-protection rationale for recognizing that Section 1823(e) does not preclude a defense of fraud in the factum.

the court of appeals observed (Pet. App. 18 & n.2), petitioner's conduct is precisely the sort against which Section 1823(e) was designed to protect the FDIC. Accordingly, the court of appeals was correct in holding that Section 1823(e) bars petitioner's attempt to defeat the FDIC's enforcement of its deed of trust on the basis of a secret side agreement.

In any event, even if any instrument that is void under state law were outside the coverage of Section 1823(e), it is by no means clear that the deed of trust—given by Nelson to the Bank and later purchased by the FDIC—would actually be void under Texas law. Notwithstanding the generally rigid homestead provision of the Texas Constitution, parties who participate in bogus transactions may be estopped under Texas law from benefiting from their own wrongdoing and prevailing against innocent third parties. See, *e.g.*, *National Bond & Mortgage Corp.* v. *Davis*, 60 S.W.2d 429, 434 (Tex. Comm'n App. 1933) ("it was never intended by the framers of the Constitution that the homestead law should be used to defeat the rights of an innocent third party, who, in good faith, without notice, for a valuable consideration, has acquired valid liens against the property"); *Rabbe* v. *Federal Land Bank*, 161 S W.2d 1097 (Tex. Civ. App. 1942) (when a husband and wife execute a deed conveying property and the deed is properly recorded, the parties are estopped from declaring the vendors' lien void because the deed conveyed homestead property as part of a simulated transaction); *Goodrich* v. *Second Nat'l Bank*, 151 S.W.2d 276 (Tex. Civ. App. 1941). See also *Collier* v. *Union Central Life Ins. Co.*, 100 F.2d 411, 413-414 (5th Cir. 1938) (holding Texas decisions "vigorous and unswerving" in protecting innocent lenders by estopping borrowers from asserting homestead rights on collateralized property after procuring a loan through

"misrepresentation, fraud, or other machination" concerning the property's homestead character).[7]

Finally, the federal common law doctrine of *D'Oench, Duhme, supra,* independently supports the court's result and bolsters the court of appeals' application of Section 1823(e). *D'Oench, Duhme* held that the FDIC, having acquired a note from a failed bank, was immune from a defense asserted by the maker of the note, where the maker had, by entering into a secret agreement with the bank, "lent himself to a scheme or arrangement whereby the banking authority * * * was likely to be misled." 315 U.S. at 460. That rule squarely applies to this case. Moreover, this Court in *Langley* recognized, based on *D'Oench, Duhme*, that the term "agreement" in Section 1823(e) should not "be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes" (108 S. Ct. at 402). The same principle applies to the proper construction of the phrase "right, title or interest" in Section 1823(e): consistent with their permissible meaning, those words were properly construed by the court of appeals to ensure that Section 1823(e) precludes a defense squarely covered by *D'Oench, Duhme.*

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[7] Accordingly, contrary to petitioner's argument (Pet. 6-7), the decision of the court of appeals does not undermine or conflict with the law of Texas.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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